

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

EDWARD YBARRA,

Plaintiff,

vs.

M MARTEL, Warden,

Defendant.

CASE NO. 09cv1188-LAB (AJB)

**ORDER ADOPTING REPORT
AND RECOMMENDATION, AND
DENYING PETITION FOR WRIT
OF HABEAS CORPUS**

Petitioner, a prisoner in state custody, filed his petition for writ of habeas corpus in this Court. Pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72, the petition was referred to Magistrate Judge Anthony Battaglia for a report and recommendation. After receiving briefing, Judge Battaglia issued his report and recommendation (the "R&R"), in which he recommended denying Ybarra's request for an evidentiary hearing and denying the petition. Judge Battaglia denied Ybarra's request for an evidentiary hearing. Ybarra then filed lengthy objections to the R&R.

I. Legal Standards

A. Objections to R&R

A district court has jurisdiction to review a Magistrate Judge's report and recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the

1 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The
2 Court reviews de novo those portions of the R&R to which specific written objection is made.
3 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Courts are
4 not obligated to review vague or generalized objections to an R&R; a petitioner must provide
5 specific written objections to invoke the Court's review. *Dawson v. Ryan*, 2009 WL 4730731
6 at *2 n.1 (D. Ariz., Dec. 7, 2009) (citations omitted); *accord Sison v. Small*, 2010 WL
7 4806888 at *2 –*3 & n.2 (S.D.Cal., Nov. 18, 2010). Conclusory objections are likewise
8 insufficient. *Sison* at n.2.

9 Ybarra filed 63 pages of objections to the 16-page R&R. Some effort was apparently
10 made to organize them so as to correspond to particular sections of the R&R, but they are
11 not in any very coherent order, and exhibits as well as other types of documents are included
12 in the objections. The 33-page body of the objections is followed by attached exhibits, which
13 Ybarra asks the Court to read through. Although the objections are disjointed and somewhat
14 difficult to follow, the Court construes them liberally. *Karim-Panahi v. L. A. Police Dep't*, 839
15 F.2d 621, 623 (9th Cir. 1988).

16 As a preliminary matter, the Court notes that Ybarra has included a number of outside
17 documents. Including an exhibit or a copy of another document is not the same as making
18 a "specific written objection" as contemplated under Rule 72(b)(2). Exhibits or courtesy
19 copies of legal authority may *support* objections, but they are not themselves objections.

20 Ybarra has also included extensive but unexplained citations to or quotations of
21 records and legal authorities, and has copied the text of Westlaw headnotes into his
22 objections. It is not the Court's role to serve as an advocate for any party, even one
23 proceeding *pro se*. The Court therefore does not review isolated, unexplained citations or
24 quotations for the purpose of creating or suggesting arguments. But to the extent possible,
25 the Court has given these citations and quotations a liberal construction and attempted to
26 discern the points Ybarra is trying to make.

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1 **B. Federal Habeas Review**

2 In addition to the federal habeas standards correctly noted in the R&R, the Supreme
3 Court has recently issued decisions emphasizing certain standards for federal habeas
4 review. The R&R is modified to include citations to these newly-available authorities.

5 A federal writ of habeas corpus is not available to correct errors of state law.
6 *Swarthout v. Cooke*, ___ S.Ct. ___, 2011 WL 197627 at *2 (Jan. 24, 2011) (citations
7 omitted). And an error of state law is not a denial of due process. *Id.* at *3 (citation omitted).

8 State courts are intended to be the principal forum for litigating constitutional
9 challenges to state convictions. *Harrington v. Richter*, ___ S.Ct. ___, 2011 WL 148587 at
10 *12 (Jan. 11, 2011). “A state court’s determination that a claim lacks merit precludes federal
11 habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state
12 court’s decision.” *Id.* at *11 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).
13 Federal habeas review is a “‘guard against extreme malfunctions in the state criminal justice
14 systems,’ not a substitute for ordinary error correction through appeal.” *Id.* at *12 (quoting
15 *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

16 In view of the nature of Ybarra’s objections, it is also appropriate to add that the Court
17 must assume the state court findings of fact are correct, and Ybarra has the burden of
18 rebutting this presumption by “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

19 **II. Discussion**

20 Ybarra was convicted in California state court of vandalism, battery, making a criminal
21 threat, and attempting to prevent a witness from testifying. Based in part on his criminal
22 history, the state court sentenced him to a term of 61 years to life.

23 The R&R sets forth the state court’s findings in detail. It describes his conduct
24 towards his victim over the course of about a year. Among other things, the evidence
25 showed he pushed and slapped his victim; he repeatedly called and came to the trailer
26 where she lived, refusing to leave when asked; he went through her belongings secretly and
27 without permission; he called and told her he had her panties; he yelled at her and called her
28 foul names; he burned her bedding; he broke three windows of her trailer and ran away; he

1 telephoned her three times on the same day, threatening to kill her and people she was with,
 2 and he sent her a menacing letter before she was to testify at his trial. The R&R concluded
 3 the evidence against him was “overwhelming.”

4 Ybarra brings four exhausted claims: ineffective assistance of trial counsel, ineffective
 5 assistance of appellate counsel, prejudicial trial court error, and prosecutorial misconduct.
 6 In his objections, Ybarra also spends a good deal of time raising unexhausted claims, such
 7 as arguing he should have been allowed to put on more evidence that his victim had
 8 hepatitis C and used intravenous drugs,¹ arguing California’s “three strikes” law is
 9 unconstitutional. He takes exception to various other aspects of his trial counsel’s strategy,
 10 which he didn’t raise in his state court habeas petitions. Finally, in large part his objections
 11 constitute a re-argument of the evidence. Apparently, he is asking this Court to review and
 12 re-weigh all the evidence and order that he be given a new trial. (Obj. to R&R, 27 (arguing
 13 federal district court has discretion to grant a new trial, if the verdict was against the weight
 14 of the evidence)).

15 **A. Ineffective Assistance of Trial Counsel**

16 In his objections, Ybarra cites multiple pages of trial transcript, then points to various
 17 things that happened at trial. He argues that his attorney was ineffective for failing to
 18 introduce certain pieces of evidence and for failing to follow the trial strategy Ybarra urged
 19 him to. (Obj. to R&R, 17–25.) He also points to a letter his appellate counsel sent, which
 20 he thinks said his trial counsel was ineffective.² (*Id.* at 6–7.)

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 22 ¹ Evidence of this type was introduced at trial, but apparently Ybarra is now arguing
 that more evidence should have been introduced.

23 ² Ybarra claims this letter was filed as exhibit 8 of 9 to his request for judicial notice,
 24 filed on June 15, 2009. He faults Judge Battaglia for failing to rely on it. That request for
 25 judicial notice attaches far more than nine exhibits, however, and they are not clearly
 26 numbered. The Court was only able to locate two letters, one at page 27 of docket number
 27 13 and a second at page 97 of the same docket number. Neither letter has anything to do
 28 with ineffective assistance of trial counsel. The first letter expresses dismay at having
 received 250 pages of hand-written notes from Ybarra and at his insistence on directing her
 appellate strategy to focus on what she concluded were unfounded claims, and the second
 explains the limited nature of the appeal she was filing. Ybarra did attach a portion of the
 letter to his objections, however (see Obj. to R&R, 28), and it doesn’t say what Ybarra
 believes it does. Instead, the letter merely uses ineffective assistance of trial counsel as an
 example of a claim that would be outside the trial record. And even if Ybarra had a letter

1 This is, in essence, a blanket disagreement with his counsel's strategy. Ybarra
 2 doesn't show that his counsel's strategy was at all unreasonable, much less that his
 3 performance fell below the required level. His trial counsel was not ineffective for failing to
 4 introduce evidence the trial court had excluded, for failing to cross-examine two police
 5 officers who responded to the victim's 911 call.³

6 In addition, the Court has reviewed the excerpt of a transcript of a hearing in the trial
 7 court, which he included in his objections to show his counsel was ineffective. (Obj. to R&R,
 8 17–22.) Far from showing his counsel was ineffective, they show Ybarra harbored highly
 9 unrealistic expectations of his counsel and the course of action Ybarra thought was
 10 appropriate was actually improper and would have been ineffective. That transcript shows
 11 Ybarra retained control over whether to plead guilty and whether to testify at trial, but that
 12 Ybarra's attorney was appropriately in charge of other strategic decisions. The trial judge
 13 attempted to explain to Ybarra that his attorney's approach was correct,⁴ but Ybarra
 14 persisted in his beliefs.

15 Elsewhere in his objections, Ybarra appears to be arguing that his trial counsel should
 16 somehow have prevented the judge from allowing a 911 recording to be played in the jury
 17 room. The actual ruling is discussed below, but as concerns his counsel's performance it
 18 is enough to point out that his counsel did do as much as he could have done, by objecting
 19 and arguing it was improper.

20 Furthermore, Ybarra hasn't shown he was prejudiced by anything his counsel did or
 21 failed to do. Even if his attorneys had followed the strategy he urges, it is unlikely he would

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 23 from his appellate counsel saying his trial counsel had been ineffective, that wouldn't suffice
 24 to show trial counsel was ineffective.

25 ³ The 911 call is discussed in more detail in sections II.C and II.D, below. For reasons
 26 explained there, Ybarra's trial counsel's efforts to have the call excluded were futile and the
 27 officers' testimony (even assuming they had testified as Ybarra now supposes they would)
 28 would have had little if any effect on the outcome.

⁴ By way of example, Ybarra thought his attorney should have written down Ybarra's
 statement and introduced it as evidence at the preliminary hearing. The trial judge pointed
 out this would not have been admitted, and attempted to disabuse Ybarra of his
 misunderstandings. (Obj. to R&R, 18:21–19:27.) The trial court's assessment of Ybarra's
 approach was shared by Ybarra's appellate counsel. See *supra* note 1.

1 have been acquitted. As the state court found, the case against him was overwhelming, and
2 not weak as he now claims.

3 **B. Ineffective Assistance of Appellate Counsel**

4 Ybarra argues his appellate counsel was ineffective, that the prosecution's case was
5 "weak" and should have been more effectively challenged on appeal. (Obj. to R&R, 25–26.)
6 He doesn't rebut any of the state court's factual findings, though. Rather, he merely
7 reiterates his arguments, urging the Court to reject the state court's findings and interpret the
8 existing evidence differently. (See, e.g., Obj. to R&R, 30–31 (raising arguments about
9 omission of his last name from a police report, which was raised and rejected by the state
10 courts).)

11 As noted, the Court defers to the state court's findings of fact unless Ybarra rebuts
12 them by clear and convincing evidence. He hasn't rebutted them. The Court does not find
13 Ybarra's appellate counsel was deficient, much less that she failed to provide effective
14 assistance. His counsel was not ineffective for failing to re-argue his entire case on appeal
15 and obtain a new trial. The state court has made clear a new trial would not have been
16 granted based on the weight of the evidence. His appellate counsel therefore appropriately
17 limited his appeal to one possibly winnable issue, and there is no showing that if she had
18 brought other claims (which, after talking with him, she concluded were unfounded) the result
19 would have been any different.

20 Furthermore, Ybarra hasn't shown he was prejudiced by anything his appellate
21 counsel did or failed to do. Indeed, for both trial and appellate counsel, the record strongly
22 suggests Ybarra's views about how the trial or appeal should be conducted were
23 unreasonable, and his counsel properly attempted to counsel him and rein him in while at
24 the same time advocating effectively for him.

25 **C. Court Misconduct**

26 The victim's state of mind was relevant at Ybarra's trial. The prosecution offered a
27 recording of a 911 call the victim made, in which she said she was afraid of Ybarra in part
28 because he was a criminal and had killed people. This evidence was admitted, with a

1 limiting instruction being given several times, explaining it was only relevant and could only
 2 be considered for the purpose of showing the victim's state of mind. The judge told the jury
 3 that statements in the call about Ybarra shouldn't be accepted as true, and that Ybarra
 4 "hasn't been convicted of murder or anything like that." ((R&R at 10n.1 (quoting 8 RT 324))).
 5 After admitting the evidence over Ybarra's counsel's objection, the judge later allowed it to
 6 be played in the jury room.

7 This cannot support habeas relief. Ybarra's trial in state court was governed by state
 8 rules of procedure and evidence, and not federal rules as he now argues.⁵ If the trial court
 9 committed any error, it was an error of state law. Errors of state law do not give rise to
 10 federal habeas relief. See *Swarthout*, 2011 WL 197627 at *2.

11 Playing the recording did not deprive Ybarra of his confrontation rights or other due
 12 process rights. The trial court's instructions effectively prevented the recording from being
 13 misused by the jury, and in any event the victim testified and was cross-examined about
 14 what she said.

15 **D. Prosecutorial Misconduct**

16 The alleged misconduct here consists of introducing perjured testimony and failing
 17 to withdraw or correct it. Ybarra points to a police report made after two police responded
 18 to a 911 call at his victim's trailer home. The police report omitted his last name. Ybarra
 19 alleges the victim testified falsely when she said the police told her about Ybarra's criminal
 20 record, which made her more afraid of him. This evidence was offered to show the victim's
 21 state of mind, an element of the crime. Ybarra has argued they could not have told the
 22 victim about his record, since the police report omitted his last name. This, he believes,
 23 shows they couldn't have known about his criminal record and therefore couldn't have told

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 26 ⁵ In his objections, Ybarra bases his arguments on federal rules. He cites federal
 27 authority for the principle that the 911 recording shouldn't have been played in the jury room.
 28 (Obj. to R&R, 27–28.) He also argues evidence of other crimes he may have committed was
 inadmissible under the Federal Rules of Evidence. (*Id.*, 3–4.) The R&R cited *United States*
v. DeCoito, 764 F.2d 690, 695 (9th Cir. 1985) for the principle that sending properly admitted
 exhibits into the jury room was permitted. This citation is intended to show, not that federal
 practice rules govern state court proceedings, but that a practice that is acceptable in federal
 court cannot violate clearly established federal law.

1 the victim about it. He concludes that the victim must have been lying. Ybarra has asked
2 for an evidentiary hearing so that he can obtain the testimony of the two officers.

3 For several reasons, this claim must fail. First, the testimony was at best unsure.
4 (See, e.g., Pet., 72–73 (excerpt of transcript).) Second, even assuming the victim lied on
5 the stand, there is no evidence the prosecution knew this or discovered her testimony was
6 perjured and allowed it to go uncorrected, as would be required to establish a federal due
7 process claim. See *Pavao v. Cardwell*, 583 F.2d 1075, 1076–77 (9th Cir. 1978) (citing
8 *Napue v. Illinois*, 360 U.S. 264 (1959)). Third, materiality is an element of a due process
9 claim based on a prosecutorial misconduct, *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982),
10 and the false testimony (if it was false) wasn't material. Other unchallenged evidence
11 showed Ybarra's victim had many reasons to fear him. He had violently struck her, verbally
12 abused her, broken her windows, burned her bedding, come to her home and refused to
13 leave, and threatened several times to kill her. She had twice called 911 when Ybarra was
14 menacing her. The victim had also been warned by Ybarra's mother to hide and stay inside
15 her home, because Ybarra was on drugs, had a bat, and intended to kill the victim. In short,
16 there was ample other evidence Ybarra's victim was afraid of him, and the allegedly false
17 testimony doesn't meet the materiality standard set forth in *Wood v. Bartholomew*, 516 U.S.
18 1, 5 (1995).

19 No evidentiary hearing is required here, because the police officers Ybarra proposes
20 to call could not offer testimony showing that the prosecution knew the victim's testimony
21 was perjury. See *Schiro v. Landrigan*, 550 U.S. 465, 474 (2007) (giving standard for
22 granting an evidentiary hearing). Furthermore, the testimony Ybarra supposes the officers
23 would give would be vastly outweighed by other evidence showing the victim was afraid of
24 him. The record therefore precludes relief. See *id.* (explaining that no hearing is required
25 where the record precludes habeas relief).

26 **E. Other Objections**

27 Ybarra now raises numerous arguments and claims he didn't raise in state court, or
28 even in his petition. Obviously, the R&R didn't address claims not in his petition. But none

1 of these are exhausted. To the extent Ybarra is now attempting to raise claims he didn't
2 exhaust in state court, they are barred. And in any event, the Court in reviewing his
3 objections has determined they are meritless.

4 Ybarra raises one argument he could not have raised before, which is that the
5 California Supreme Court, in denying his petition, was required to issue a full, reasoned
6 opinion rather than a "post card" denial. (Obj. to R&R, 29.) He also seems to be arguing
7 that a "post card" denial is not entitled to deference. These arguments are frivolous; a state
8 court is not required to give its reasons for denying a habeas petition, and even if it does not
9 do so, its judgment is entitled to deference. *Harrington*, 2011 WL 148587 at *9.

10 Ybarra accuses Judge Battaglia of failing to read the pleadings, failing to review the
11 evidence, and making up falsehoods. (See, e.g., Obj. to R&R, 6, 30–31.) This isn't an
12 adequate objection, and it is demonstrably untrue since the R&R cited to and quoted the
13 evidence. If the R&R was incorrect, Ybarra should have responded by pointing out
14 specifically where it was wrong, and showing why it was wrong. See Fed. R. Civ. P. 72(b)(2).

15 Finally, Ybarra repeatedly asks this Court to review and reassess all the evidence,
16 effectively rehearing his entire case on the papers. He argues that because his trial lasted
17 three days and the jury deliberated for an hour and fifteen minutes, his 61-year sentence is
18 unreasonable. He concludes his objections by asking the Court to read through his entire
19 trial transcript. (Obj. to R&R, 33.) This is not the function of federal habeas review.
20 *Harrington*, 2011 WL 148587 at *12. Furthermore, Ybarra had a trial, a full appeal and state
21 habeas review, and the evidence was more than sufficient to convict him. The amount of
22 time it took to try and convict him is beside the point here.

23 **III. Conclusion and Order**

24 The R&R is **MODIFIED** to include the new citations to *Swarthout* and *Harrington*. The
25 Court has reviewed *de novo* all portions of the R&R to which Ybarra objected, and
26 **OVERRULES** his objections. The Court has also reviewed the R&R more generally, and
27 concludes its findings and recommendations are correct. Ybarra's objections are

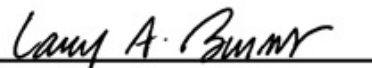
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1 **OVERRULED**, and the Court **ADOPTS** the R&R, as modified. All pending motions are
2 **DENIED** as moot. The Petition is **DENIED**.

3 For reasons set forth above, the standard for issuance of a certificate of appealability
4 is not met. See *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000). The certificate
5 of appealability is therefore **DENIED**.

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7 **IT IS SO ORDERED.**

8 DATED: February 10, 2011

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10 **HONORABLE LARRY ALAN BURNS**
11 United States District Judge
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